No. 3517

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ALBERT YOUNG,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

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Statement of the Case.

The plaintiff in error and one Walter Dekau were charged by an information filed November 28, 1919, in the Southern Division of the United States District Court for the Northern District of California, with violating section 3 of the act commonly known as the "National Prohibition Act". The charging part of the information alleges:

> "That Walter Dekau and Albert Young, hereinafter called the defendants, heretofore, to wit, on the twentieth day of November, in the year of our Lord one thousand nine hundred and nineteen, at San Francisco, in the Southern Division of the Northern District of

> California, then and there being, did then and there, in violation of section 3 of the act of October 28, 1919, known as the 'National Prohibition Act', unlawfully, willfully and knowingly maintain a public and common nuisance in that they did unlawfully, willfully and knowingly sell and keep for sale for beverage purposes on the premises at Number 2965 Sixteenth street in San Francisco aforesaid, certain intoxicating liquor, to wit, whiskey" (Transcript of Record, p. 3).

Upon the trial of the cause both of the defendants were convicted. Thereafter their counsel moved for a new trial upon the grounds:

1. That the verdict is against the law.

2. That the verdict was not sustained by the evidence.

3. That the verdict was against the weight of the evidence.

At the same time the defendants moved in arrest of judgment upon the grounds:

1. That the information does not state facts sufficient to constitute an offense against the laws of the United States.

2. That the court had no jurisdiction to try the case.

3. That section 3 of title I of the so-called "National Prohibition Act" is unconstitutional in that it is not within the power of Congress to deprive this or any other state of its police powers (Transcript of Record, pp. 31-32).

Both of these motions were denied by the court, which thereupon passed judgment and sentence of fine and imprisonment upon both defendants. From this judgment the plaintiff in error prosecutes this writ.

Specification of Errors.

In seeking a reversal of this judgment the plaintiff in error relies upon the following errors committed by the trial court:

(1) That the evidence introduced and received at the trial of this cause was wholly insufficient to warrant a verdict of guilty as to the plaintiff in error, and that the trial court therefore erred in denying a motion for an instructed verdict of not guilty as to the plaintiff in error made by his counsel at the conclusion of the trial.

(2) That the information upon which plaintiff in error was convicted does not state facts sufficient to charge plaintiff in error with having committed any crime or offense aginst the laws of the United States and that therefore the trial court erred in denying plaintiff in error's motion in arrest of judgment.

(3) That the trial court also erred in denying the said motion in arrest of judgment for the reason that the court below had no jurisdiction to try the cause, the prosecution being not by indictment but by information.

I.

Brief of the Argument.

THE EVIDENCE WAS INSUFFICIENT TO JUSTIFY A CONVICTION.

In discussing this phase of the case we shall set forth a synopsis of the evidence as it appears in the record.

One R. W. Gloss, whose testimony will be found in the Transcript, pages 10-15, testified that he was a Deputy Collector of Internal Revenue, assigned for the enforcement of the War Time Prohibition Act. About 5:30 o'clock in the evening of November 20, 1919, he visited the place of business of the plaintiff in error at San Francisco in company with another deputy collector. This place of business was a saloon. At the end of the bar there was a private office, and as the witness entered he saw a man drinking a drink. The bartender came up to the cash register *with the cash* in his hand and rang up twenty-five cents. The officers took the glass away from the bartender and both of them smelled the glass and it smelled like whiskey. In the private office an overcoat was hanging, in the pocket of which there was a bottle of whiskey. The witness did not see the bartender serve liquor out of the bottle, but he saw him put the bottle back in the overcoat pocket. Young, the plaintiff in error, was not on the premises at the time, but was at home, and the bartender referred to in this testimony was Dekau, the plaintiff in error's co-defendant. The

officers made a search of the premises and did not find any liquor other than that contained in the bottle in the overcoat pocket. The license of the saloon stood in the name of the plaintiff in error.

Similar testimony was given by the witness J. P. Doyle, the other deputy collector, who visited the premises on the occasion referred to, with the previous witness. He also testified that Mr. Young was not in the saloon at the time of the alleged sale (Transcript, p. 17).

Walter Dekau, charged in the information as W. Dekan, the co-defendant of plaintiff in error, took the stand in his own behalf. Besides denying that he made any sale of liquor on the occasion in question, and stating that the liquor found in the bottle in the overcoat pocket was liquor which he brought to the saloon when he went to work, for his own personal use, he gave the following testimony:

> "Q. Have you ever received any instructions from Mr. Young, the proprietor of the saloon, with reference to your conduct in the sale of liquor to anyone?
>
> A. He gave me orders not to sell any.
>
> Q. If there was any liquor sold on those premises on that particular day, it would have been sold against Mr. Young's consent?
>
> A. Yes, sir" (Transcript of Record, pp. 20-21).

Albert Young, the plaintiff in error, called as a witness in his own behalf, testified that on the day in question he had been in San Mateo, and did not arrive at the saloon until eight o'clock in the even-

ing. He further testified that he never kept any whiskey on the premises; that he instructed his bartenders to serve no hard liquor, "to take no chances, just to serve soft drinks" (Transcript, pp. 24-25).

This testimony given by the defendants was absolutely uncontradicted. No other witnesses were produced by either side, and the foregoing constitutes an accurate synopsis of all the evidence produced at the trial.

At the conclusion of the case, defendants' counsel moved the court to instruct the jury to acquit the plaintiff in error on the ground that the government had not established any case against him. This motion was denied by the trial judge, and this refusal is assigned as error. Thus we are brought to the question of the sufficiency of the evidence to justify the verdict.

It must be borne in mind at the outset that the defendants were not charged in the information with making an illegal sale of liquor. The charge laid against them was that of maintaining a public and common nuisance

> "in that they did unlawfully, willfully and knowingly sell and keep for sale for beverage purposes, certain intoxicating liquor, to wit, whiskey."

It must further be borne in mind that the government's case establishes only this much: that the defendant Dekau, during the absence of plaintiff in

error, made one sale of liquor from a bottle which he had in his overcoat pocket; that a search of the premises by the officers failed to discover any other liquor thereon (Transcript, p. 15); that plaintiff in error had given positive instructions to his employees that they were not to sell any liquor. In view of this, it must be apparent, we submit, that the evidence was wholly insufficient to justify the jury in convicting the plaintiff in error. In this behalf we most respectfully call the attention of the court to the following considerations:

First. There is not in the record a scintilla of evidence, either direct or circumstantial, which tends in the remotest degree to show that plaintiff in error authorized or had the slightest knowledge of the one illegal sale proved by the government.

Second. There is not in the record a word of testimony to show that any other sales had ever been made on the premises; neither is there any other evidence that tends to show, either directly or by inference, that the proprietor of the saloon had knowledge that any liquor was ever on the premises.

Third. On the contrary, the uncontradicted evidence is that the only sale proven was made against the express instructions of plaintiff in error, and during his absence from the saloon.

Had there been evidence of other sales, or had the officers found a quantity of liquor stored or kept on the premises, the jury *might* then have been justified in drawing the inference that the

proprietor had knowledge of the commission on the premises of such illegal acts. But to hold him criminally liable for maintaining a nuisance because his bartender, during his absence, made one illegal sale from a bottle, not kept on the premises, but carried in by the bartender in his overcoat pocket, would be to perpetrate a glaring injustice. To use the language of the learned Justice Cooper of the California District Court of Appeal:

> "But the sages of the law and the learned judges have established the rule that the independent acts and declarations of one man shall not be evidence against another. It is sufficient for everyone to answer for his own sins, and not for the sins of his neighbor."
>
> People v. Schmitz, 7 Cal. App. 355.

The fact that the relationship of master and servant existed between plaintiff in error and his co-defendant does not strengthen the government's case in the slightest degree. The vicarious liability which attaches to a master in civil cases for the acts of a servant while acting within the scope of his employment cannot be invoked in criminal cases. The rule of *respondeat superior* has no application here. Proof of express authorization is necessary before the employer can be held criminally liable, and such proof was not forthcoming in the case at bar.

The cases are uniform to this effect. We will call the attention of the court to a few of them. In People v. Green, 22 Cal. App. 45, 50, it is said:

> "The civil doctrine that a principal is bound by the acts of his agent within the scope of the latter's authority has no application to criminal law (1 McLain on Criminal Law, sec. 188). While false pretenses may be made to (*by?*) an agent of (*to?*) the person defrauded, yet when made by an agent they must be directly authorized or consented to in order to hold the principal, for authority to do a criminal act will not be presumed (1 McLain on Criminal Law, sec. 683)."

Commonwealth v. Stevens, 155 Mass. 291, 29 N. E. 508, was a prosecution for illegally selling liquor to a minor. The evidence showed that the sale was made by the clerk of the defendant. The court says:

> "The criminal liability of a master for the act of his servant does not extend so far as his civil liability, inasmuch as he cannot be held criminally for what the servant does contrary to his orders, and without authority, express or implied, merely because it is in the course of his business, and within the scope of the servant's employment; but he would be civilly liable for a tort of this kind (George v. Gobey, 128 Mass. 289; Roberge v. Burnham, 124 Mass. 277)."

In Grant Bros. Const. Co. v. United States, 13 Ariz. 388, 114 Pac. 955, it is said:

> "This act, a statute of the United States, being penal in its consequences, must be strictly construed, and as knowledge is the principal and indispensable ingredient of the offense, the government, the plaintiff in the case, must be held to proof of such knowledge or to proof of circumstances from which it might be fairly

> inferred. Unless the evidence, therefore, affords proof of knowledge by the construction company, or proof of circumstances from which such knowledge may be fairly inferred, of the acts of Carney and his associates, the construction company cannot be held liable for such acts of Carney, for the master or principal is not liable criminally for the unlawful acts of his agent or servant, though such unlawful act be committed in the master's business, unless such unlawful act was directed by him or knowingly assented to or acquiesced in."

In State v. Henaghan, 73 West Virginia 706, 81 S. E. 539, we read:

> "The relation of principal and agent, or of employer and employee, is not recognized in the criminal law. By that law, every man must stand for himself."

In cases involving the alleged illegal sale of liquor, the decisions are uniform to the effect that the master is not criminally liable for illegal sales made by his clerk, servant or agent, without his knowledge or consent, express or implied, or in his absence and in disobedience to his commands or instructions. For example, under the Iowa statute relating to liquor nuisances, it was held that one is not liable criminally for an unlawful sale made without his knowledge and consent by his clerk.

State v. Hayes, 67 Iowa 27; 24 N. W. 575;

See also to the same effect:

Grosch v. Centralia, 6 Ill. App. 107;
Lathrope v. State, 51 Ind. 192;
Wadsworth v. State (Texas), 34 S. W. 934.

Thus it has been held that a conviction of selling intoxicating liquor without a license cannot rest upon the evidence merely that the person who made the sale was the defendant's clerk, in the absence of any evidence that defendant authorized the sale or participated therein.

Daniel v. State, 149 Ala. 44; 43 S. 22;
Seibert v. State, 40 Ala. 60.

To warrant a conviction for sales made by defendant's bartender in violation of the law, it must appear that defendant gave no orders not to make such sales, or that if such orders were given they were not in good faith.

Commonwealth v. Tittlow, 28 Pa. Co. Ct. 341;

In the Rhode Island case of State v. Burke, 15 R. I. 324, 4 Atl. 761, it was held that one cannot be convicted of maintaining a liquor nuisance by proof of sales on Sunday by an agent without proof of knowledge on the part of defendant, and without proof of authority, either express or implied.

In view of the evidence in the case at bar and the undoubted and unquestionable principles of law applicable thereto, we respectfully submit that the trial court should have instructed the jury to acquit the plaintiff in error. There is not in the entire record a scintilla of evidence to sustain the conviction as to him.

II.

THE INFORMATION CHARGES NO CRIME AGAINST THE UNITED STATES.

The information in this cause will be found on page 3 of the Transcript. The charging part thereof is set forth in the Statement of Facts which forms the introductory portion of this brief. The informtion, it will be noted, contains no statement of any of the facts constituting the alleged offense. It merely alleges, without giving any particulars whatsoever, that the defendants did sell and keep for sale certain intoxicating liquor. No particulars whatever are given. There is nothing to inform the defendants as to the charge which they would be called upon to meet, and they were plainly entitled to more specific information as to the particulars of the offense charged than is furnished them by the accusatory paper on file herein. Furthermore, the information is fatally defective in failing to aver that either of the defendants was the owner, or in the possession of, or had any control of any kind or character over the premises therein named. There is specific adjudication upon this question. In the case of State v. Nickerson (Kansas), 2 Pac. 654, the defendant was prosecuted for a common nuisance in selling and keeping for sale intoxicating beverages. The Kansas statute, which seems to be the prototype of the common nuisance section of the so-called Volstead Act, declared and denounced as a public and common nuisance premises upon which alcoholic liquors were sold, kept for sale, given

away or furnished. We quote the language used by the Supreme Court of Kansas relative to an information far more specific than the one in the case at bar:

> "The first question arises upon the information, which, omitting the caption and verification, reads as follows:
>
> 'In the name and by the authority of the State of Kansas, I, G. W. Hurd, county attorney in and for said county, do now give here the court to understand and be informed that the above-named defendants, Maurice Robecker and Benjamin Nickerson, at divers days and times between the first day of June, 1881, and the time of filing this information, in a certain wooden building on lot 91, on Main street, known as Billiard Parlor, in the city of Solomon, in said county of Dickinson and State of Kansas, then and there being, did then and there and still continue to unlawfully sell, barter, and give away and keep for sale, barter, and use, spirituous, malt, vinous, fermented, and other intoxicating liquors, without taking out and having any permit or legal authority therefor, to the common nuisance of all the people of the State of Kansas, there lawfully being, and contrary to the statutes in such cases made and provided.
>
> 'G. W. Hurd, County Attorney.'
>
> "Does this charge an offense under section 13 of the prohibitory law, or one under section 7, or none at all? It would seem that the pleader intended to prosecute under section 13, but we are constrained to hold that it fails to state an offense under that section. At least, it states one only impliedly and by indirection, which is not good in criminal pleading. The section declares that all places where liquor is sold, etc., are common nuisances, and the owner or keeper thereof shall upon conviction be adjudged guilty

> of maintaining, etc. In other words, the party must be the owner or keeper of the place in which the liquor is sold, and it is immaterial whether he owns or has control of the liquor itself. Now, the charge is that he kept and sold liquor in the place; not that he owned or kept the place. Doubtless, proof that he kept and sold liquor in the place would sustain a finding that he was the keeper of the place; but still that is only evidence, and not the fact to be proved, and in criminal pleadings the ultimate fact and not the evidence of it must be charged. Directness and certainty must always be insisted upon in criminal matters. Thus, and thus only, can there be a certainty that a party complained of knows exactly what is charged against him, and what he msut be prepared to try. Thus, and thus only, can the protection which is due to every person charged with a criminal violation of law be secured."

A mere reading of the statute under which the plaintiff in error was prosecuted is sufficient to demonstrate the force of our contention. Section 3 of Title I of the "National Prohibition Act", upon which the information is based, reads as follows:

> "Section 3. Any room, house, building, boat, vehicle, structure, or place of any kind where intoxicating liquor is sold manufactured, kept for sale, or bartered in violation of the War Prohibition Act, and all intoxicating liquor and all property kept and used in maintaining such a place, is hereby declared to be a public and common nuisance, and any person who maintains or assists in maintaining such public and common nuisance shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than $100 nor more than $1000, or be imprisoned for not less

than thirty days or more than one year, or both. If a person has knowledge that his property is occupied or used in violation of the provisions of the War Prohibition Act and suffers the same to be so used, such property shall be subject to a lien for, and may be sold to pay, all fines and costs assessed against the occupant of such building or property for any violation of the War Prohibition Act occurring after the passage thereof, which said lien shall attach from the time of the filing of notice of the commencement of the suit in the office where the records of the transfer of real estate are kept; and any such lien may be established and enforced by legal action instituted for that purpose in any court having jurisdiction. Any violation of this title upon any leased premises by the lessee or occupant thereof shall, at the option of the lessor, work a forfeiture of the lease."

Now what is the crime denounced by the foregoing section of the statute? The crime consists not in the selling of the liquor, but in the maintaining of the place where liquor is sold, manufactured or kept for sale.

Obviously a stranger to the premises—a guest of the owner, perhaps, or a trespasser—could not be guilty of maintaining a nuisance because he would have no control over the premises. The crime denounced by the foregoing section of the statute can be committed only by the owner or occupant, or by somebody having possession or control over the property. This is not alleged in the information.

Furthermore, the information nowhere alleges any facts from which it is made to appear that a

nuisance in fact existed. Before any place can be a nuisance it must be common; it must have acquired a *status.* The information does not charge more than one sale on one particular day; and the evidence produced shows only one sale. The decisions are almost uniform to the effect that a single sale of liquor is not sufficient to constitute a nuisance. Thus, in State v. McIntosh (1903), 98 Me. 397, 57 Atl. 83, an indictment under a statute charging the defendant with keeping and maintaining a liquor nuisance, it is held that

> "one or more unlawful sales of intoxicating liquor in a place does not necessarily, and as a matter of law, make that place a common nuisance. The place must be habitually, commonly used for the purpose before it becomes a common nuisance."

The statute involved in this case provided that

> "all places used for the illegal sale or keeping of intoxicating liquors, all houses, shops or places where intoxicating liquors are sold for tippling purposes, all places of resort where intoxicating liquors are kept, sold, given away, drank or dispensed, in any manner not provided for by law, are common nuisances."

It had been held previous to the decision in State v. McIntosh (Me.), supra, that two sales would not as a matter of law constitute a house a nuisance, the court stating that

> "the evidence of such sales would be competent for the jury to consider upon the issue whether or not the house was habitually employed by the defendant for the purpose of selling contrary to law. And if it satisfied them beyond

> reasonable doubt that the defendant was in the habit of so selling therein, they might so find. The weight or value of such testimony was within their exclusive province, and it was erroneous for the court to fix the weight or value which they should give it."
>
> State v. Stanley (1892), 84 Me. 555; 24 Atl. 983.

In Com. v. Patterson (1885), 138 Mass. 498, 5 Am. Crim. Rep. 329, a complaint

> "for keeping and maintaining a common nuisance, to wit, a certain tenement used for the illegal sale and illegal keeping of intoxicating liquors",

the defendant, who had a license to sell liquors to be drunk on the premises, was shown to have made two sales, on two separate occasions, of liquor which was carried away from the premises. The jury were instructed

> "that if the defendant was proprietor of the saloon, and made either of the two illegal sales that were testified to, they must return a verdict of guilty."

The Supreme Court, in commenting upon this instruction, states:

> "This went too far; for, even if a single sale was sufficient evidence to warrant a conviction on this complaint, it certainly did not of itself constitute the offense set forth, or amount to more than evidence for the jury on which they might convict. A building cannot be said to be used for the illegal sale of intoxicating liquors, within the meaning of the Public Statutes, chap. 101, sec. 6, which makes it a nuisance, nor can the proprietor be said to

> keep or maintain such common nuisance within sec. 7 on the strength of a single casual sale, made without premeditation in the course of a lawful business. Not only do the words 'used' and 'keep' or 'maintain' import a certain degree of permanence, but the same idea is usually a part of the conception of a nuisance."

In this behalf we further call the attention of the court to the witty, brilliant and unanswerable dissenting opinion of Justice Robinson of the Supreme Court of North Dakota in Scott v. State, 163 N. W. 813:

> "One swallow does not make a summer; one love affair does not make a bawdyhouse. The house must be kept as a resort for illegal and immoral purposes; the wrong must be common or it is not a common nuisance and the legislature cannot make it otherwise. It is perfectly absurd to say that the keeping of a house wherein one, two, or three drinks are sold or given away is the keeping of a common nuisance.
>
> In Cana of Gallilee there was a wedding feast, and the mother of Jesus was there, and both Jesus and his disciples were called to the marriage, and when they wanted wine the mother of Jesus said unto the servants: 'Fill the water pots with water'. And they filled them up to the brim. Then he said unto them: 'Draw out now, and bear unto the governor of the feast'. And they bear it. When the ruler of the feast had tasted the water that was made wine, and knew not whence it was, the governor of the feast said to the bridegroom: 'Every man at the beginning doth set forth good wine, and when men have well drunk then that which is worse, but thou hast kept the good wine until now'. This beginning of miracles did Jesus in Cana of Galilee and manifested forth his glory.

It cannot be truly said that any person at that feast was guilty of keeping or maintaining a common nuisance, or that in North Dakota the recurrence of such a marriage feast would constitute the keeping or maintaining of a common nuisance. In Scripture drunkenness is everywhere denounced, but on occasions the drinking of wine and even strong drink is commended. Thus we did read: 'Give strong drink to him that is ready to perish and wine to those that be heavy of heart. Let him drink and forget his poverty and remember his misery no more'. 'Go thy way, eat thy bread with joy, and drink thy wine with a merry heart, for God now accepteth thy works'. He brought forth food out of the earth and wine that maketh glad the heart of man.

And the Apostle Paul writes to the Apostle Timothy: 'Drink no longer water, but use a little wine for thy stomach's sake and thine often infirmities'.

It is right to forbid the sale of drinks to Indians, minors, to some persons of Celtic blood, and to any person who does not know enough to care for himself and his family; but to forbid a taste of wine, beer, ale, or Dublin stout to an Anglo-Saxon or a Teuton, why, that is cruelty. And cruelty, thou art a wickedness.

The majority opinion says it is virtually conceded that if the testimony as stated be true, it is sufficient to establish the crime alleged. That is a grave mistake. There is no such foolish and false concession, and if there were, it would in no way justify the court in sustaining the conviction. The testimony wholly fails to show that the defendant kept a disorderly house or a common nuisance, or a house in any way given to the sale or drinking of intoxicating liquors, or that he did an injury to any person. Under the rulings of the court,

were Christ to come to this state and to keep a house and to repeat the miracle of the marriage feast, he might be convicted and sentenced to the state's prison. That is neither law nor gospel.

It is a matter of regret that in some cases judges are too ready to give a narrow and cold-blooded construction to drastic statutes and to impose on others burdens grievous to be borne, which they themselves touch not with one of their fingers.

At the Grand Pacific I have a nice, exclusive bachelor apartment ($45 a month). Now, if the governor, the bishop, or one of the justices call on me and I open a bottle of foamy Dublin stout, my elixir of life, and for his stomach's sake or for good fellowship give him a glass and join him in a drink with a thousand earnest wishes for his health and happiness, does that make my nice, exclusive apartment a common nuisance? If I call on the good bishop, and he treat me to a glass or a bottle of wine, does that turn his palace into a common nuisance? If not, then is there one law for the palace and another law for the cottage? In administering the law we should never forget that the primary purpose of law and government is to build up, and not to pull down; to assure the right of all to enjoy and defend life and liberty, to acquire, possess, and protect property, and to pursue and obtain safety and happiness."

Since the information does not charge and since the evidence does not show more than one sale, we respectfully submit that the plaintiff in error could not have been guilty of maintaining a common nuisance. The information by reason of its failure to charge any facts showing that the premises were

habitually used for illegal sales, fails to charge the commission of the crime attempted to be charged. Accordingly, since he was convicted upon an accusation that did not charge any crime, the plaintiff in error's motion in arrest of judgment was well taken, and should have been granted by the court below.

III.

THE COURT BELOW HAD NO JURISDICTION TO TRY THE INFORMATION.

It is our contention that prosecution of offenses under the "National Prohibition Act" by information is unconstitutional, and even if constitutional, is contrary to the express prohibitions of the act itself.

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." (Constitution: Am. V.)

Even if it be held that the crime of which plaintiff in error was convicted was not an "infamous crime", still the provisions of the Prohibition Act seem to inhibit the filing of informations, and to contemplate prosecutions by indictment alone. Section 2 of the act provides:

> "The Commissioner of Internal Revenue, his assistants, agents, and inspectors, shall investigate and report violations of the War Prohibition Act to the United States Attorney for the district in which committed, who shall be

charged with the duty of prosecuting, subject to the direction of the Attorney General, the offenders as in the case of other offenses against laws of the United States; and such Commissioner of Internal Revenue, his assistants, agents, and inspectors may swear out warrants before United States Commissioners or other officers or courts authorized to issue the same for the apprehension of such offenders, subject to the control of the United States Attorney, conduct the prosecution at the committing trial *for the purpose of having the offenders held for the action of a Grand Jury.*"

The act confers no authority to file informations on the United States Attorney, and obviously can have no other meaning than that proceedings against offenders must be by indictment.

It is respectfully submitted that the judgment should be reversed.

Dated, San Francisco,
October 20, 1920.

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